Supreme Court, U.S.
FILED

No. 96-1681 APR 21 1997

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ALLEN MORGAN,
SUPERINTENDENT, KNOX COUNTY SCHOOLS,
Petitioner,

v.

CHRIS L., A MINOR BY NEXT FRIEND, MIKE L.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

CHARLES L. WEATHERLY
JULIE J. WEATHERLY
THE WEATHERLY LAW FIRM
3700 Crestwood Parkway, N.W.
Suite 140
Duluth, Georgia 30136
(770) 564-9400

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

RICHARD T. BEELER
Law Director
KNOX COUNTY GOVERNMENT
Suite 612
City-County Building
400 Main Street
Knoxville, Tennessee 37902
(423) 215-2327

Counsel for Petitioner

* Counsel of Record

April 21, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether public school officials can be enjoined from reporting delinquent behavior by a disabled student occurring on school property to appropriate juvenile authorities without first following the procedures for a "change of placement" under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415.

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
1. Regulatory Background	3
2. Facts	4
3. Proceedings Below	6
REASONS FOR GRANTING THE PETITION	8
CONCLUSION	15

TABLE OF AUTHORITIES

CASES — Page

Davies Warehouse Co. v. *Bowles*, 321 U.S. 144 (1944) 9
In re Gault, 387 U.S. 1 (1967) 9, 12
Hendrick Hudson Dist. Bd. of Educ. v. *Rowley*, 458 U.S. 176 (1982) 9, 10, 12
Honig v. *Doe*, 484 U.S. 305 (1988) 10, 13, 14
McKeiver v. *Pennsylvania*, 403 U.S. 528 (1971) 12
New Jersey v. *T.L.O.*, 469 U.S. 325 (1985) 8
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 11
United States v. *Lopez*, 115 S. Ct. 1624 (1995) 8
Virginia Dep't of Educ. v. *Riley*, 106 F.3d 559 (4th Cir. 1997) 10, 11

STATUTES AND OTHER AUTHORITIES

20 U.S.C. § 1400(c) 3
20 U.S.C. § 1401(a) 3
Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415 ..... 2, 3, 4, 10, 13
Tennessee Code Annotated § 37-1-129(c)(2) 4
§ 49-6-4301(a) 2, 5
34 C.F.R. § 300.2(b)(4) 3
U.S. Dep't of Education, *The Condition of Education 1995*, p. 362, Table 47-1 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-

ALLEN MORGAN,
SUPERINTENDENT, KNOX COUNTY SCHOOLS,
Petitioner,

v.

CHRIS L., A MINOR BY NEXT FRIEND, MIKE L.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Allen Morgan, Superintendent of Knox County Schools, hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals is not published and is included in the Appendix at 1a-12a. The district court's memorandum opinion and order of September 29, 1994 is reported at 927 F. Supp. 267 and is reproduced in the Appendix at 13a-26a. The final order of the administrative law judge of July 30, 1993 is included in the Appendix at 27a-44a.

JURISDICTION

The opinion of the court of appeals was entered on January 21, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 615(e)(3) of the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(e)(3)(A) ("IDEA") provides in pertinent part:

> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . until all such proceedings have been completed.

Section 49-6-4301(a) of the Tennessee Code Annotated provides:

> Every teacher observing or otherwise having knowledge of an assault and battery or vandalism endangering life, health or safety committed by a student on school property shall report such action immediately to the principal of such school. Every principal having direct knowledge of an assault and battery or vandalism endangering life, health or safety committed by a student on school property or receiving a report of such action shall report such action immediately to the municipal or metropolitan police department or sheriff's department having jurisdiction. T.C.A. 49-6-4301(a).

STATEMENT OF THE CASE

This case presents a question of exceptional importance to the proper administration of public schools, the effective administration of the states' juvenile justice systems and to fundamental principles of federalism. School officials uncovered the commission of an act of delinquency and, as required by state law, they reported the youth they

suspected of committing the acts to juvenile justice authorities. The court of appeals has now ordered the School District effectively to withdraw its report—and thereby divest the juvenile justice system of jurisdiction—on the extraordinary ground that the child had a disability and that the mere act of reporting a juvenile offense constituted "a change of placement" that could not proceed without complying with the various procedural requirements of the IDEA. 20 U.S.C. § 1415(e)(3). This remarkable intrusion of federal judicial power into the State's heretofore unquestioned plenary authority over matters involving health and safety in public schools and juvenile justice conflicts with the approach taken by the Fourth Circuit and by this Court in at least one prior case and raises a critical issue concerning the proper limits of the IDEA that warrants review by this Court.

1. *Regulatory Background.* The Individuals with Disabilities Education Act ("IDEA") is Spending Clause legislation that was enacted, in part, to ensure the right to "a free appropriate public education" to all children with disabilities. 20 U.S.C. § 1400(c). The Act describes a "free appropriate public education" as including "special education and related services."[1] "Special education" in turn is defined as "specially designed instruction" that may occur in a number of settings, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. 20 U.S.C. § 1401(a)(16). The regulations are clear that "educational programs" include those implemented in state correctional or juvenile facilities and that the requirements of the IDEA apply to such facilities. 34 C.F.R. § 300.2(b)(4).

The IDEA primarily seeks to provide disabled students with access to a public education. In protecting the right of access, however, the Act provides substantial procedural guarantees to the student and his or her

[1] 20 U.S.C. §§ 1400(c), 1401(a)(18).

parents. Thus, prior to a change in placement, the school system is required: 1) to provide the parents or guardians with access to all relevant records concerning the child's placement (20 U.S.C. § 1415(b)(1)(A)); 2) to give written prior notice to the parents of the proposed change (*id.* § 1415(b)(1)(C)); 3) to permit a parent to file a complaint and to grant the parent an opportunity for an impartial due process hearing by the local educational agency (*id.* § 1415(b)(1)(E), (b)(2)); 4) to permit an appeal to the State educational agency (*id.* § 1415(c)); and 5) to permit a further appeal to a state trial or federal district court (*id.* § 1415(e)). During the pendency of these proceedings, the "child shall remain in the then current educational placement of such child . . . ." *Id.* § 1415(e)(3).

Under the juvenile laws of the State of Tennessee, a child's right to special education services under IDEA continues after a juvenile petition has been filed. If a juvenile court finds that a child is delinquent, dependent, neglected or unruly, Tennessee law provides that the State must continue its obligations to determine appropriate educational services for a student in need of special education. Section 37-1-129(c)(2) of the Tennessee Code Annotated provides: if there is a finding that special education services are necessary, "state and federal laws governing placement must be followed." Thus, by operation of law, there is no denial of any IDEA rights simply because a child has been brought before the juvenile court. The most that will occur under Tennessee law as a result of a referral of a student with disabilities to juvenile court is a possible change in the location or site in which an appropriate Individualized Education Program ("IEP") under the IDEA will be implemented.

2. *Facts.* At the time of the incident giving rise to this case, respondent Chris L. was a 14-year old ninth grader who attended Knox County's Northwest Middle School. Petitioner is the Superintendent of the Knox County Schools. Chris and another student were involved

in an incident in which either he or the other student, or both, vandalized and destroyed school property by kicking in a water pipe in the school bathroom. This resulted in approximately $1,000 worth of property damage. App. 2a.

In response to this incident, an employee of the school system filed a juvenile petition, which alleged that Chris " 'did on May 11, 1993, commit the offense of vandalism, in that said child, along with [another child], did kick and twist a main water pipe in a bathroom [at Chris's school].' " App. 28a (alterations in original). This filing satisfied the School System's obligations under T.C.A. 49-6-4301(a), to report all instances of "vandalism endangering . . . health or safety committed by a student on school property" to the appropriate law enforcement authorities.

Prior to this incident Chris had been diagnosed by a private physician as having Attention Deficit Hyperactivity Disorder (ADHD) and was prescribed medication to assist him in coping with this condition. Although in an earlier academic year it had been determined that Chris was not disabled within the meaning of the IDEA, the process of evaluating his status was re-instituted in February of 1993 by the School System because Chris was having difficulty in his academic performance and was exhibiting behavioral problems. In addition, Chris's medication was increased and his school was asked to monitor Chris's reaction to the increased dosage.

While an evaluation of Chris was being completed by the school, Chris and another student committed the act of vandalism at issue. Chris was suspended from school for three days as a result of his involvement. On May 12, 1993, a petition was filed in the Juvenile Court of Knox County, Tennessee.

A school disciplinary hearing was scheduled for the following Monday, May 17, 1993. When Chris's father arrived at the school for the hearing, a juvenile officer

and the principal of the school were present. The principal also convened a Multi-disciplinary Team ("M-Team") meeting to assess Chris's situation and to devise an IEP for Chris to follow for the remainder of the school year.

Prior to this meeting, Chris did not have an IEP, nor was he receiving special education services. At the meeting, the incident of May 11th was discussed, the results of Chris's evaluation were reviewed and an IEP was formulated for Chris, which recommended that he be placed in a self-contained special education classroom with work provided by the regular eighth grade teachers and with an educational emphasis on behavior. In addition, it was determined that Chris's unexplained presence in the bathroom was not a product of his disability, but that the vandalism was a manifestation of his ADHD. Chris's father signed a form that indicated he understood his right to due process, had reviewed the assessment report and agreed to the recommendations of the M-Team.

3. *Proceedings Below.* On June 4, 1993, Chris's father filed a request for a due process hearing before the Tennessee State Department of Education. The Department appointed an administrative law judge to hear the matter. All issues in the case were resolved, except "whether [Knox County Schools] violated the [IDEA] by filing [on May 12, 1993] a juvenile court petition [in Knox County Juvenile Court] for alleged school behavior without first following the required procedure to insure [Chris]'s rights under the IDEA." App. 27a; see also *id.* at 4a. The ALJ found that "[t]he filing of a petition in Juvenile Court shall be considered as the initiation of a change in placement and/or a disciplinary action commensurate with expulsion or suspension for more than ten days." *Id.* at 42a. Accordingly, the ALJ concluded: "before a school files a petition against a child in Juvenile Court, it must follow the same procedures as for expulsion or suspension for more than ten days." *Id.* Because a

school employee had complied with state law and immediately reported the act of vandalism on school property, the ALJ held that the School System had violated Chris's rights under the IDEA. Accordingly, the ALJ ordered the School Superintendent to "take all actions necessary to seek dismissal of the juvenile court petition filed against this student." *Id.* at 43a.

On appeal to the United States District Court for the Eastern District of Tennessee, the court affirmed the decision of the ALJ. First, the court acknowledged that the question of whether the filing of a juvenile petition should be treated as a change in placement is a question of law. In sweeping language the court held:

> [the] initiation of juvenile court proceedings concerning a disabled child [should] be treated as a change in educational placement, so that the child receives all of the protections mandated by IDEA before adjudication of the child as unruly or delinquent.

App. 20a. The district court reasoned in support of this conclusion that "[w]hat makes the filing of an unruly petition a change in placement for IDEA's purposes . . . is the potential which juvenile court proceedings have for changing a child's educational placement in a significant manner." *Id.* Based on this "potential," the court concluded that it was permissible to "order[] the [School Superintendent] to seek termination of the juvenile court proceeding against Chris L." *Id.* at 21a.

The Sixth Circuit affirmed. App. 1a-12a. Like the district court, the court of appeals concluded that the question presented is purely an issue of law. *Id.* at 5a. The court of appeals analyzed the issue in terms of whether a juvenile petition constitutes a "change in placement," which would be subject to the stay-put protections of the IDEA. *Id.* at 9a. Thus, the IDEA's procedures apply "whether school officials are contemplating a con-

ventional change in placement, suspension, expulsion or juvenile charges." *Id.* Accordingly, the court of appeals concluded that the federal courts have authority to order a school system to withdraw a juvenile petition from a state court whenever the petition has been filed without complying "with the IDEA's procedural requirements." *Id.* at 12a.

REASONS FOR GRANTING THE PETITION

The decision of the Sixth Circuit has sent shockwaves throughout both the state educational community and state juvenile justice systems. School officials, who are legitimately concerned with the safety and security of students and school property, must now consider whether a student who engaged in illegal conduct may have a disability and whether the procedures of the IDEA must therefore be satisfied before seeking the intervention of juvenile justice authorities. Historically, this Court has acknowledged the primacy of the states in regulating public education and the states' important interest in taking steps to eradicate crime and violence from the classroom environment. Public education and violent crime are local rather than national concerns, and the local schools have an important interest in maintaining discipline in the classroom. See *New Jersey* v. *T.L.O.*, 469 U.S. 325, 339-40 (1985); *id.* at 350 (Powell and O'Connor, JJ. concurring). Moreover, local governments must be able to pass laws effectively to resolve the increasing problem of crime in schools. See *United States* v. *Lopez*, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J.) (describing local control of education and students carrying guns as "a traditional state concern"). As this Court has recognized, school violence significantly interferes with education. *Id.* at 1659 (Breyer, J. dissenting) (describing the effect of violence in schools as "teachers unable to teach, students unable to learn").[2]

---

[2] Nor are these concerns mere matters of judicial conjecture. A University of Michigan survey has reported that more than 40%

Conversely, under the ruling below juvenile justice authorities will not have problem children brought to their attention in a timely fashion or perhaps even at all. This Court has recognized the States' longstanding effort to treat and rehabilitate delinquent children, relying upon methods that are " 'clinical' rather than punitive." *In re Gault*, 387 U.S. 1, 15-16 (1967). Of course, the States' ability to implement these objectives depends upon detecting children who require or would benefit from treatment. The Sixth Circuit decision will directly interfere with the States' efforts in this regard.

To be sure, Congress certainly has the authority to implement such a radical intrusion into the States' affairs so long as it employs its Spending Clause powers and demonstrates unmistakably that this is the price state and local officials must pay for federal financial aid to assist the disabled. But this result must be plainly required by the statute. *Hendrick Hudson Dist. Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 204 n.26 (1982). That is because "[t]he existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation." *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 154 (1944). Nothing in the IDEA, however, remotely indicates that it was intended to interfere with the normal relationship between local public school systems and the states' juvenile justice systems.

The logic of the Sixth Circuit is fundamentally at odds with the approach recently followed by the Fourth Circuit

---

of high school seniors indicate that they have been victimized at school. U.S. Dep't of Education, *The Condition of Education 1995*, p. 362, Table 47-1 (using data from University of Michigan, Survey Research Center, Institute of Social Research, *Monitoring the Future Study*). The same survey reveals that more than 20% of high school seniors report having been either injured or threatened with a weapon at school. *Id.* These are alarming statistics that demonstrate that schools are already having a difficult time responding to the problem of delinquency.

in *Virginia Department of Education* v. *Riley*, 106 F.3d 559 (4th Cir. 1997) (adopting *en banc* the opinion of Luttig, J., dissenting in *Virginia Dep't of Educ.* v. *Riley*, 86 F.3d 1337, 1347-58 (4th Cir. 1996)). While the circumstances of the two cases are different, the Fourth Circuit insists that before a State's ability to deal with disabled students who are expelled from school for actions unrelated to their disabilities can be interfered with by the federal government, there must be a clear statement that Congress intended that result. The logic of that argument would require reversal in this case. That alone justifies certiorari.

The decision below also departs from this Court's prior decision interpreting the IDEA's predecessor—the Education for the Handicapped Act—in which this Court recognized that the "stay-put" provision in the Act, 20 U.S.C. § 1415(b)(1), "in no way purports to limit or pre-empt the authority conferred on courts . . . ; indeed, it says nothing whatever about judicial power." *Honig* v. *Doe*, 484 U.S. 305, 327 (1988). By ordering a validly filed juvenile petition removed from the Juvenile Courts of Tennessee, the Sixth Circuit has given the IDEA a reach this Court refused to give it in *Honig*. Just as the court of appeals' ruling in *Honig* "placed an intolerable burden on the State" that justified certiorari, *id.* at 317, the holding here has that same effect and warrants certiorari for that same reason.

1. In *Riley* the Fourth Circuit *en banc* confronted the issue of whether the Commonwealth of Virginia could retain and enforce its policy that a disabled student who is suspended or expelled from school for actions unrelated to a disability forfeits his or her right to receive alternative educational services. The Department of Education interpreted the IDEA to prohibit such a policy and threatened to cut off Virginia's financial assistance under the Act.

Relying upon the "clear statement" rule applied to the IDEA's predecessor in *Rowley*, *supra* and more fully

elaborated in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981), the court of appeals rejected the Department of Education's argument. Instead, the court of appeals held that the IDEA does not contain "the . . . clarity required for the appropriation of a core state function," such as dealing with unruly or misbehaving students. *Riley*, 106 F.3d at 566. Describing the federal government's effort to interfere with the State's policy of dealing with expelled or suspended students as "a pretentious arrogation of state power," the Fourth Circuit rejected the federal government's expansive interpretation of the IDEA. *Id.* at 572.

The contrast in approaches between the Fourth Circuit in *Riley* and the Sixth Circuit here could not be more stark. The court here was utterly unconcerned about the extraordinary "arrogation of state power." The very idea of a federal court effectively enjoining state juvenile proceedings by ordering public school officials to withdraw a juvenile petition that was mandatory and appropriate under Tennessee law is breathtaking. But the court of appeals was completely oblivious to the extraordinary effect on fundamental principles of federalism embodied in its holding.

This failure even to notice the affront to federalism arising out of the decision below no doubt explains the absence of any serious effort to identify what in the statute authorizes a federal court to exercise such control over the State's method of enforcing its system of juvenile justice. Relying solely on the "stay-put" provision in the Act, the court held that the threat of a change of placement authorizes a federal court to enjoin school officials from invoking the juvenile justice system.

Not only does the stay-put provision not remotely purport to pre-empt juvenile court proceedings (see *infra* p. 13), but the impact of the mere filing of a juvenile petition is manifestly less significant to the disabled student than the complete exclusion from school services approved by the Fourth Circuit in *Riley*. Tennessee does

not terminate educational services to children in its juvenile justice system. See *supra* p. 4. To the contrary, it expressly requires the provision of a free appropriate public education in whatever setting the child is located, including if the student is institutionalized. Thus, the basic right of access to a public education that animated passage of the law (see *Rowley*, 458 U.S. at 192-93 (discussing legislative history)), is left completely intact even after the juvenile court takes the most extreme action available by ordering the juvenile placed in the State's custody. Moreover, nothing prevents the juvenile court from deciding that the matter is better dealt with by school officials and parents and therefore deciding on its own to dismiss the juvenile petition.

What the Sixth Circuit has lost sight of is that

> "[t]he juvenile court is a court of law, charged like other agencies of criminal justice with protecting the community against threatening conduct. Rehabilitating offenders through individualized handling is one way of providing protection, and appropriately the primary way in dealing with children. But the guiding consideration for a court of law that deals with threatening conduct is nonetheless protection of the community."

McKeiver v. *Pennsylvania*, 403 U.S. 528, 546 n.6 (1971) (quoting Task Force Report 9). The order effectively enjoining this process therefore deprives the State of the benefits of the juvenile justice system[3] without any corresponding improvement in achieving the aims of the federal statute. It is a peculiar brand of federalism that condones this kind of an outcome. Certainly, Congress must speak more directly and convincingly before this result can be justified. At a minimum, the federal courts' intrusion into Tennessee's ability to manage school affairs

---

[3] In *In re Gault*, 387 U.S. 1, 17 (1967), the Court described this system as arising out of "the highest motives and most enlightened impulses."

and handle problems concerning juvenile justice involves precisely the kind of "arrogation of state power" the Fourth Circuit rejected in interpreting the IDEA. The vastly different approaches to issues of state authority under the IDEA embodied in *Riley* and this case warrants review by this Court.

2. The court of appeals' expansive interpretation of the stay-put provision in the IDEA also is clearly inconsistent with the limitations placed on that provision by this Court in *Honig*. The question in *Honig* was whether a disabled student could be expelled or suspended from school for more than 10 days without complying with the procedural requirements of the IDEA. The Court held that expulsion for more than 10 days constituted a "change in placement" under the Act and thus could only be ordered after following the IDEA's procedures.

Honig, the superintendent of schools, argued that this ruling would hamstring school officials in dealing with a student who "poses an immediate threat to the safety of others." *Honig*, 484 U.S. at 325. In rejecting this argument, the court placed an important gloss on the "stay-put" injunction in § 1415(e)(3). The Court held that the evil this provision sought to remedy "was the unilateral exclusion of disabled children by *schools*, not courts." *Id.* at 327 (emphasis in original). In language that seems decidedly inconsistent with an injunction aimed at divesting the Tennessee juvenile court of jurisdiction, this Court stated plainly that "[t]he stay-put provision . . . says nothing whatever about judicial power." *Id.* If the enforcement mechanism of the IDEA was not intended to affect judicial power, it is extremely difficult to fathom how a school system's attempt to invoke that power, as it was required to do by state law, can be enjoined. The IDEA merely prevents "the unilateral exclusion of disabled children by *schools*, not courts" and thus the schools mere unilateral action in invoking the court's jurisdiction logically does not violate the Act as interpreted in *Honig*. *Id.* Certainly, the Sixth Circuit's striking and unexplained

departure from this Court's analysis in *Honig* warrants further review.

* * * *

Student violence and disruption in the public schools of this nation is fast reaching crisis proportions. The burdens school officials face in attempting to respond to this problem are extraordinary. The notion that a school official dealing with delinquent behavior should consider first the commands of the IDEA before invoking the powers of the juvenile justice system is nothing short of astonishing. The further idea that a federal court has authority to enjoin petitioning the juvenile court system to enforce this Act is even more astonishing. Nothing in the statute authorizes this action and this Court's decision in *Honig* seems plainly to recognize that judicial efforts ought not to be restricted by extreme applications of the IDEA.

In sum, the decision below undermines both educational and juvenile justice authority without any corresponding benefit to the goals of the federal statute. Indeed, the harm to state interests is effected without any statutory support, much less a clear and unambiguous expression of congressional intent. This is precisely "the arrogation of state power" the Fourth Circuit rejected *en banc*, and therefore, this Court should grant certiorari to clarify the scope of federal court authority under the IDEA and to ensure that the state's traditional interests are not "intolerabl[y] burden[ed]." *Honig*, 484 U.S. at 317.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES L. WEATHERLY
JULIE J. WEATHERLY
THE WEATHERLY LAW FIRM
3700 Crestwood Parkway, N.W.
Suite 140
Duluth, Georgia 30136
(770) 564-9400

RICHARD T. BEELER
Law Director
KNOX COUNTY GOVERNMENT
Suite 612
City-County Building
400 Main Street
Knoxville, Tennessee 37902
(423) 215-2327

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

April 21, 1997

APPENDICES

APPENDICES

APPENDIX A

[Filed Jan. 21, 1997]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH DISTRICT

No. 96-6561

ALLEN MORGAN,
Superintendent, Knox County Schools,
Plaintiff-Appellant,

v.

CHRIS L., a minor, by next friend, MIKE L.,
Defendant-Appellee.

On appeal from the United States District Court
for the Eastern District of Tennessee

BEFORE: CONTIE, SUHRHEINRICH, and COLE; Circuit Judges.

Per Curiam. Plaintiff-appellant Allen Morgan, Superintendent of the Knox County (Tennessee) School System, appeals the judgment of the district court affirming the ALJ's decision that the Knox County School System violated the Individuals with Disabilities in Education Act (the "IDEA") by (1) filing a juvenile court petition against Chris L., who was diagnosed with attention deficit hyperactive disorder and (2) by not following the appropriate procedures for initiating a "change in placement," 20 U.S.C. ss 1400 *et seq.* For the following reasons, we affirm the judgment of the district court.

Chris L. ("Chris") attended Knox County Northwest Middle School during the 1991-1993 school years. In May 1992, at the suggestion of a school psychologist, Chris was set to a private medical doctor about his behavioral problems. Chris's physician diagnosed him as suffering from attention deficit hyperactive disorder ("ADHL") and was prescribed the medication Ritalin to control his behavior, part of which was to be administered during school hours. Mike L., Chris's father, made the school aware of Chris's diagnosis and the medication that he was to receive. There is no dispute that the school knew that Chris suffered from ADHD and that the school knew he was being treated for the disorder.

Chris's academic and behavioral problems worsened. On February 11, 1993 the school initiated the process to consider Chris's eligibility for disabled status under the IDEA.[1] The school sent home an IDEA consent form notifying Chris's parents of that process. On February 12, 1993, Chris's pediatrician increased his medication. On February 26, 1993, the school referred the matter to the IDEA school support team ("S-team") to gather information about Chris's disability. On March 16, 1993, Chris's father returned the consent form. During this period, Chris began psychotherapy at the suggestion of school personnel, yet his behavior continued to worsen. After sending the consent form, the school took no further action in determining whether Chris was considered handicapped under the IDEA.

On May 11, 1993, Chris and another boy entered a bathroom on school property to which they were not allowed access. During that time the students allegedly vandalized a water pipe, resulting in approximately $1000 water damage. Chris was suspended for three days as a result of this incident. On May 12, 1993, the Knox County School System filed a petition in the Juvenile Court

---

[1] Chris had been evaluated for an IDEA disability on one occasion, but school officials concluded that he was not eligible.

of Knox County, Tennessee, against Chris. On May 17, 1993, the school system scheduled a disciplinary hearing. While this disciplinary hearing was in progress, it was modified to become an "M-team" meeting because Chris had been taking medicine for ADHD.[2] Chris's parents were notified of the disciplinary hearing and attended the meeting; however, they were given no notice of the possibility of an M-team meeting. The school psychologist, the school principal, the school guidance counselor, and another teacher who was well acquainted with Chris's academic and behavioral troubles, were also at the meeting. The school system's security officer, who filed the juvenile court petition, was not in attendance. During this meeting, Chris was certified as disabled for purposes of the IDEA because of ADHD. As a disabled student, the M-team created an individualized Education Plan ("IEP") for Chris. They decided that in the future Chris's education would take place in a self-contained special education classroom with work that was provided by the regular eighth grade teachers with an emphasis on behavior. Chris's parents reviewed the M-team's assessment and agreed to its recommendations.

At this meeting, the vandalism incident was also discussed. After Chris's certification, the principal surmised that Chris's destructive behavior in the bathroom might have been attributed to his ADHD, however, his unauthorized presence in the bathroom could not be explained by his handicap. The principal decided that the presence in an unauthorized place would result in discipline. The school principal also told the parents that the decision of whether to file a juvenile court petition would be made later. Chris's parents were later notified by mail that a juvenile court petition had already been filed on

---

[2] An "M-Team" meeting is a "Multi-disciplinary Team" meeting that is specially organized by individuals with knowledge of the child and his behavior. 34 C.F.R. §§ 300.343, 300.344 and 300.345.

May 12, 1993, prior to their disciplinary/-M-team meeting on May 17, 1993.

On June 4, 1993, Chris's parents requested a hearing with an Administrative Law Judge ("ALJ") before the state board of education, asserting that the school system had violated the IDEA in filing the petition. The school system filed a motion to dismiss the matter, alleging that the ALJ did not have jurisdiction in that only the juvenile court and the state court of appeals could consider whether the filing of a juvenile petition violated the IDEA. On July 30, 1993, the ALJ issued his order, denying the motion to dismiss and requiring the Knox County School System to seek the dismissal of the juvenile court petition because the destruction of school property had been a manifestation of Chris's disability. The ALJ also determined that the filing of a juvenile petition could be considered a "change in placement" under the IDEA.

Despite having been ordered to seek the dismissal of the juvenile petition, the Knox County School System did not do so. On appeal from the ALJ's decision, the district court determined that the ALJ's order was entitled to deference and that the school administration had failed to comply with the procedural requirement of the IDEA in (1) determining that Chris was eligible to be treated as a disabled child, (2) notifying Chris's parents that he should be certified as educationally disabled because of ADHD, and (3) filing a petition in juvenile court.

One issue remains before this court today; whether on May 12, 1993, by filing a juvenile court petition for the alleged destruction of school property, the Knox County School System was in violation of IDEA procedural requirements insuring Chris's rights.

I.

a. Standard of Review

The Supreme Court has previously articulated the proper standard of review for cases that fall under the IDEA in *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176 (1982). "[Rowley] requires a de novo review [of the Due Process hearing] but . . . the district court should give due weight to the state administrative proceedings in reaching its decision." *Roncker ex rel Roncker v. Walter*, 700 F.2d 10:8, 1062 (6th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983). Our court has explained that the "federal courts are 'generalists with no expertise in the educational needs of handicapped children, and will benefit from the fact finding of a state agency with expertise in the field." *Doe v. Smith*, 879 F.2d 1340, 1343 (6th Cir. 1989), *cert. denied*, 493 U.S. 1025 (1990).

The degree of deference owed to the lower courts in a case like this, however, is uncertain. Often appellate courts have been unable to discern guidelines that are clear from the statutory language. *See e.g., Thomas v. Cincinnati Board of Education*, 918 F.2d 618 (6th Cir. 1990). The issue of what procedural protections are afforded a disabled child under the IDEA is an issue of law and will receive de novo review. *See Roncker*, 700 F.2d at 1062.

b. The IDEA

The IDEA was enacted to ensure the right to a free and appropriate public education to all children with disabilities. *See* S. Conf. Rep. 94-455, 94 Cong., 1st Sess. 27, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1480 and 20 U.S.C. §1412. The Act defines a "free and appropriate education" as "special education and related services." 20 U.S.C. § 1418(18). "Special education" is defined as "specially designed instruction" that may occur

in a number of settings including "classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 20 U.S.C. § 1401(16). If a student is categorized as disabled under the IDEA, a specially designed and written education plan is required. The IEP must be written and address the unique educational needs of the specific child. 20 U.S.C. § 1409(19).

In order to be eligible for federal assistance under the IDEA, a state must have a policy in place that will identify, locate and evaluate children who have a disability or who are suspected of having a disability. 20 U.S.C. §§ 1412(1) and 1412(2)(C); 34 C.F.R. § 300.128. Once a child has been identified as disabled under the IDEA, a state must ensure that a free and appropriate education is available to meet the disabled child's needs. 20 U.S.C. § 1412(2)(B) and 34 C.F.R. § 300.121. After the process is initiated in determining a child's status as disabled, the child's educational placement and any subsequent changes in placement are governed by the procedures of the IDEA.

An M-team, including the child's parents, must make or review all decisions which seek to initiate or change the placement of a child with a disability or in the process of being identified as disabled. On an M-team has met, and the school administration recommends that a "change in placement" take place for the disabled student, the parents have the right to object to the proposal and initiate a due process hearing. 20 U.S.C. § 1415(b)(1)(E). Once a parent has initiated a due process hearing, the disabled child is to "remain in the then current educational placement" pending the conclusion of the proceedings. 20 U.S.C. § 1415(e)(3). Thus, school administrators cannot unilaterally make a change in placement for a disabled student without convening an M-team meeting nor can they do so without including the disabled child's parents.

Under the IDEA, a "change in placement" is defined as a fundamental change in, or elimination of, a basic element of a child's educational program. *Lunceford v. District of Columbia Board of Education*, 745 F.2d 1577, 1582 (D.C. Cir. 1984). *See also, Abney v. District of Columbia*, 849 F.2d 1491, 1492 (D.C. Cir. 1988) (although new site was not precisely identical, a change in placement did not occur). This court decided that a "change in placement" does not occur when a student is transferred from one school to another with a comparable program. *Tilton v. Jefferson County Board of Education*, 705 F.2d 800 (6th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). However, a "change in placement" does occur when a student is transferred from a year-round program to an alternative 6-month program, but because the transfer was necessitated by budget constraints, *Tilton* held that this change in placement did not trigger the procedures that suggest no changes be made as under 20 U.S.C. § 1415(e)(3).

When disciplining a disabled child, the courts have unanimously held that expulsion or suspension for more than ten days is a "change in placement." *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982). *See also, S-I v. Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981). In *Honig v. Doe*, 484 U.S. 305 (1938), the Supreme Court addressed how schools were to accommodate disabled students who were dangerous and disruptive. The Supreme Court found that if a school system wished to suspend for more than ten days or expel a disabled student, that such an action was a "change in placement" that must be implemented through the M-Team and the IEP process, where the parents have the right to initiate a due process hearing if they disagree with the proposed "change in placement." If the parents ask for a due process hearing, the child is to remain in the current placement, until the proceedings are resolved.

III.

Children served by the IDEA suffer from a variety of physical, neurological and emotional disabilities. Chris suffered from ADHD which is recognized as a disability under the IDEA in the category of "other health impairments." 34 C.F.R. § 300.5(7). Chris's school performance was adversely affected by his ADHD in two distinct ways: (1) he suffered from failing grades and (2) he had difficulty controlling his behavior. Pursuant to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, a school must accommodate a disabled student's behavioral difficulties by developing a behavior management/discipline plan. Despite a long history of behavioral difficulties and failing grades, Knox County Schools failed to formulate a plan of intervention to accommodate Chris's known problems.

States must also comply with the procedural safeguards of the IDEA. 34 C.F.R. § 300.531 sets forth the preplacement evaluation requirements and provides that, before a child is placed in a special educational program, "a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of § 330.532." The evaluation procedure specified in § 330.532 requires testing, evaluation by a multidisciplinary team and assessment of all areas related to the disability. The regulations also provide that, when interpreting the data resulting from the evaluation procedures, consideration must be given to a variety of sources including test results, teacher evaluations, physical condition and adaptive behavior. 34 C.F.R. § 300.533. This Court requires strict compliance with the evaluation procedures of the Act. *Babb v. Knox County School System*, 965 F.2d 104 (6th Cir.) (school district's failure to fully examine academic, emotional and psychological profiles constituted procedural violation), *cert. denied*, 113 S.Ct. 380 (1992).

The IDEA requires an M-Team meeting whenever a child with disabilities exhibits significant problematic behavior, regardless of whether school officials are contemplating a conventional change in placement, suspension, expulsion or juvenile charges. Mandated IDEA procedures include the convening of an M-Team meeting with full consideration of the child's needs evaluation date, current program and placement, and placement options consistent with 34 C.F.R. §§ 300.343, 300.344 and 300.533. The IDEA also requires a meaningful opportunity for, and efforts by school officials to insure, parental participation in the meeting pursuant to 34 C.F.R. §§ 300.344 and 300.345. An M-Team meeting must meet all of the IDEA procedural requirements in order to insure that the disabled child is being provided with a free and appropriate public education. Congress included procedural safeguards ing the IDEA as a means of curbing the unilateral ability of schools to punish a disabled student for behavior that is a manifestation of the student's disabilities. Accordingly, the decisions of the ALJ and the district court simply require that schools contemplating juvenile petitions do what the IDEA requires of them.

When school systems fail to accommodate a disabled students' behaviorial problems, these problems may be attributed to the school system's failure to comply with the requirements of the IDEA. *See generally Kaelin v. Grubbs,* 682 F.2d 595 (6th Cir. 1982) (recognizing the connection between an inappropriate IEP and a student's disciplinary difficulties). In the instant action, the juvenile court petition filed by the Knox County Schools against Chris was the culmination of a long series of disciplinary actions taken against him by the school system despite their awareness of a disability and his deteriorating grades and behavior. No intervention, such as a behavior management plan, was formulated during the 1992-1993 school year. Notwithstanding the IDEA's rigid set of procedural safeguards set forth in 20 U.S.C. § 1415, Chris was not

afforded IDEA protections before being subjected to juvenile court prosecution by the Knox County Schools. Indeed, rather than affording Chris the procedural safeguards mandated by the IDEA, the Knox County Schools sought to exclude him through a punitive and disciplinary measure in juvenile court.

Both the ALJ and the district court determined that the juvenile court action filed by the Knox County School System was a proposal for, or the initiation of, a change of educational placement that, prior to filing, should have triggered the procedural safeguards of the IDEA including the convening of an M-Team meeting, under 20 U.S.C. § 1415(b)(1)(C)(i) and (ii). By filing a juvenile court petition, the Knox County School System threatened Chris with a fundamental alteration "in his educational program." Indeed, the school system's filing of the petition is at odds with its obligation to provide Chris with a free and appropriate education under the IDEA. The record reveals that Chris began the 1992-1993 school year without the special education and supportive and corrective services to which the IDEA entitled him. School officials continued to treat Chris as a disciplinary problem even though they knew that he suffered from ADHD and was being medically treated for his problem. Accordingly, the juvenile delinquency petition filed on May 12, 1993 must be viewed as a breach of the school system's obligation under the IDEA to identify, evaluate, and appropriately educate Chris as a child with disabilities.

The juvenile court petition sought Chris's adjudication, punishment and disposition as a delinquent for having entered, without authorization, and then damaged a water pipe in one of the school's bathrooms. The juvenile court petition could lead to Chris's incarceration in a juvenile detention facility. *See* Tenn. Code § 37-1-114(a)(1) (a child may be taken into custody when there is probable cause to believe that he or she has committed the de-

linquent or unruly act with which he or she is charged). Even if Chris is not incarcerated as a result of the petition, the school system conceded that one purpose of filing the petition was to secure rehabilitative services for Chris. *See* Tenn. Code § 37-1-120(1) (a juvenile court petition for delinquent or unruly conduct must allege "that the child is in need of treatment or rehabilitation"). By resorting to juvenile court, the school system is, at a minimum, proposing that the juvenile court develop its own program of rehabilitative services for Chris. Pursuant to IDEA's procedural safeguards, the school system must adopt its own plan and institute an M-Team meeting before initiating a juvenile court petition for this purpose. *See In re McCann*, 1990 W.L. 16883 (Tenn. Ct. App. 1990), *perm. app. denied*.[3]

---

[3] In *In re McCann*, the Tennessee Court of Appeals reviewed a lower circuit court's decision affirming a juvenile court's adjudication of a disabled child as unruly. The appellate court noted that before the juvenile court had considered the petition filed by a school system employee administrators at the child's school had scheduled and then canceled an M-Team meeting, and had sent to the child's parents a letter notifying them that the child needed medical care and counseling. This letter also notified the parents that there was an appointment with a juvenile court judge to discuss the child's placement. The *McCann* court overruled the determination that the child was unruly, stating that the notice provided to the parents clearly failed to comply with Tennessee regulations which govern the notice required whenever a change in a disabled child's placement is considered. The court also held that the filing of the petition which resulted in the child not attending school for two months constituted a change in a disabled child's educational placement. In so doing, the court concluded that the school administration did have some choices when dealing with a dangerous disabled child. The school administration can suspend the child for up to ten days and then during that time apply for injunctive relief, but still must follow the procedural requirements of the IDEA.

As another example, in *In re: Male Special Education Student Age 14*, Tennessee Board of Education, Oct. 9, 1987, (Memorandum Decision at page 12. R. 268), the disabled bay required discipline

Here, the school administration failed to comply with the IDEA's procedural requirements as to (1) a timely determination of Chris's eligibility to be treated as a disabled child, (2) the content and timing of the notification to Chris's parents of the M-Team meeting on May 17, 1993 which certified Chris as educationally disabled because of ADHD, and (3) the filing of a juvenile petition as a change in educational placement entitling the child to the protections of the IDEA.

By ordering the Knox County School System to take all actions necessary to seek the dismissal of its juvenile court petition filed against Chris, the ALJ and the district court properly exercised their discretion by fashioning specific relief to redress the school system's failure to provide Chris with the education to which he is entitled under the IDEA.

IV.

For the reasons enumerated above, we AFFIRM his d ;trict court's order.

---

for an act committed at school. The ALJ established that "[i]t was a violation of the special education law for the School System to initiate a juvenile petition against the child without first calling an M-Team meeting to determine how to deal with the boy's behavior." Thus, the ALJ ordered the school system to also seek the dismissal of the juvenile court petition which they had initiated. With the case of Chris, the ALJ also ordered that the school system seek the dismissal of the juvenile court petition and follow the requirements of the IDEA.

APPENDIX B

[Filed Sep. 28, 1994]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3-93-cv-0524
(nonjury)

ALLEN MORGAN,
Superintendent of Knox County Schools,
Plaintiff,

v.

CHRIS L., a minor, b/n/f Mike L.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a civil action for review of the decision of an administrative law judge (ALJ) under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.* (IDEA).

This court's jurisdiction of this civil action is established by 20 U.S.C. § 1415(e)(2) and (4)(A). In accordance with the mandate of the second sentence of § 1415(e)(2), this court has considered the records of the administrative proceedings compiled in this case, and has heard oral testimony and the arguments of counsel. The court has drawn its findings and conclusions stated herein from a preponderance of the evidence taken as a whole.

There is no dispute in this case that the parties have exhausted the administrative remedies available to them. The Honorable Jack E. Seaman, the ALJ appointed by the Tennessee Department of Education, issued a final order on July 28, 1993. [R. at 10-31.][1]

It is difficult to say what degree of deference this court should accord to the ALJ's findings and conclusions in this case. The appellate courts have been unable to divine clear guidance from the statutory langauge. *See, e.g., Thomas v. Cincinnati Board of Education,* 918 F.2d 618 (6th Cir. 1990). It seems clear that the central issue in this case, whether the defendant child was entitled to have the filing of a juvenile court petition seeking adjudication of him as a delinquent or unruly child treated as a change in placement, should be considered *de novo*; this is an issue of law concerning the level of procedural protection which IDEA requires for a child in the circumstances shown in this case. The ALJ's findings of fact, on the other hand, are entitled to deference, inasmuch as he heard the testimony presented here by way of a transcript, and given that he is employed by a state agency with expertise in this field. *See id.* at 624. Whatever the appropriate scope of review, the court finds all of the ALJ's findings of fact fully supported by the record.

These findings of fact reveal the following chronology. The defendant child, Chris L., was diagnosed as suffering from attention deficit hyperactive disorder (ADHD) in May 1992. This diagnosis by a private practitioner came after a school psychologist had suggested that the child suffers from this disorder. In May 1992, near the end of

---

[1] References to "R." and page numbers are to the administrative record filed in this civil action. Judge Seaman certified this record on December 9, 1993, and the Tennessee Attorney General sent it to the clerk of this court under the cover of a letter dated December 17, 1993. The notice of the filing of this administrative record appears as doc. 19 in this court's record of this civil action.

the academic year, the child's father delivered to the child's school Chris L.'s medicine prescribed to control his ADHD. There is no dispute that the school had knowledge of the facts that Chris L. had been diagnosed as suffering from this disorder, and that he was being treated with prescription medication for it.

When the 1992-1993 academic year commenced, no M-team was convened to consider this child's case; the process to consider this child as a candidate for special education was not initiated until February 1993. (At least once in an earlier academic year, it had been decided that the child was not disabled for IDEA purposes.) Throughout the 1992-1993 year, his academic performance and behavioral problems continued, and worsened. There was frequent contact between school personnel and Chris L.'s father, concerning such subjects as monitoring the child's behavior for the purpose of advising his pediatrician of the effects of changes in the dosage of his medication, and whether the child might benefit from psychotherapy. As the ALJ found, "The student began receiving psychological services after his first meeting with the psychologist in March of 1993 and the school personnel knew that the student was seeing the psychologist." [R. at 15.]

The father, Mike L., returned to school with his son on May 17, 1993, after having received oral notice that there would be a disciplinary hearing concerning his son held on that date. This turned out to be what the ALJ aptly called a "makeshift" M-team meeting. [R. at 28.] At this meeting, the child was certified as disabled for the purposes of IDEA. The individuals present then discussed a May 11, 1993, incident of vandalism at the school, and the child's principal stated that while the child's destructive behavior was related to his ADHD, the fact that he had been in a lavatory which he was not authorized to visit when he committed the act of vandalism was not. The principal then stated that the child's unauthorized presence in the lavatory would result in discipline.

The ALJ's summary of the child's father's testimony at the due process hearing before the ALJ concerning what happened next merits quotation:

> Throughout this meeting on May 17, 1993 the father was not advised of any rights under the IDEA. He was informed that he would later hear from the juvenile officer once they decided if they were going to file any charges or not. He called the juvenile officer later that same day and was informed that a petition had been filed. He later received in the mail a copy of the juvenile petition which had been sworn to *on May 12, 1993*.

[R. at 17 (emphasis added).]

It should be noted that the plaintiff superintendent did not call any live witnesses at the due process hearing before the ALJ. In addition to his father, Mike L., Chris L. called his psychologist, Lance T. Laurence, Ph.D. Dr. Laurence testified, to use the ALJ's words, "that the student's recorded behavior was consistent with behavior of a child with ADHD," and that the act of vandalism committed on May 11, 1993 (assuming that Chris L. committed it), "was a manifestation of the student's disability." [R. at 18.]

There is no dispute in this case that an M-team was assembled for the purpose of assessing this child in February 1993, and that Chris L. was therefore a subject of assessment for IDEA purposes when the May 11, 1993, act of vandalism occurred. It is also undisputed that before May 17, 1993, when Chris L.'s father participated in the M-team meeting, of which he had inadequate notice, to quote the ALJ again, "the student did not have an IEP [2] or placement."

---

[2] "IEP" stands for "individualized education program", which IDEA requires local educational agencies to establish or revise for

The ALJ's conclusions merit quotation in part:

> The filing of a petition in Juvenile Court shall be considered as the initiation of a change in placement and/or a disciplinary action commensurate with expulsion or suspension for more than ten days.
>
> At least beginning with the date a child is referred for an evaluation, before a school files a petition against a child in Juvenile Court, it must follow the same procedures as for expulsion or suspension for more than ten days. The M-Team must determine if the behavior was a manifestation of the child's physical or mental characteristics and the appropriateness of the placement.
>
> * * * *
>
> The school may suspend the student for up to ten days, they (sic) may reach some agreement with the student's parents regarding a change in placement, or the school may apply to a court for specific relief if a dangerous situation is presented.

[R. at 29-30 (citations omitted).] On the basis of these conclusions, the ALJ ordered the plaintiff to "take all actions necessary to seek dismissal of the juvenile court petition filed against this student." [R. at 30.]

In so concluding and ordering, the ALJ was on firm precedential ground. As counsel for Chris L. pointed out to the ALJ, at least one other Tennessee Department of Education ALJ has ruled in a due process hearing arising out of a case involving a different student and a different school system, "It was a violation of the special education law for the School System to initiate a juvenile petition against the child without first calling an M-Team meeting to determine how to deal with the boy's behavior." *In re: Male Special Education Student Age 14*, Tennessee Board of Education, Oct. 9, 1987, memorandum decision

---

each child with a disability. 20 U.S.C. § 1414(a)(5). "Individualized education program" is defined in the act in 20 U.S.C. § 1401(a)(20).

at 12. [R. at 268.] The ALJ in *In re: Male Special Education Student* similarly ordered the school system in that case to "do everything it can to have that petition [filed in juvenile court], which is presently on appeal, dismissed." *Id.* at 17. [R. at 273.]

In *In re McCann,* 1990 Tenn. App. LEXIS 125 (Tenn. Ct. App.), *perm. app. denied* (Tenn. 1990) (*per* Anderson, now Justice), the case arose in a different manner procedurally, but the issues were very similar to those in the case at bar. The Tennessee Court of Appeals in *McCann* was reviewing a circuit court's affirmance of a juvenile court's adjudication of a disabled child as unruly. The appellate court noted that before the juvenile court had considered the unruly petition filed by a school system employee, administrators at the child's school had scheduled and then cancelled an M-team meeting, and had sent to the child's parents a letter notifying them that the child needed therapeutic care/counseling, and notifying them that the school system had scheduled an appointment with the juvenile court judge to discuss the child's placement.

In overturning the adjudication of unruliness, the court of appeals in *McCann* stated that this notice clearly failed to comply with the Tennessee regulations which govern the notice required whenever a change in a disabled child's placement is considered. The court also held that the filing of the unruly petition and the hearing on the petition which resulted in the child not attending school for two months constituted a change in educational placement. Noting that IDEA (then the Education of the Handicapped Act, or EHA) gave school administrators a choice in dealing with a dangerous disabled child between suspension for up to 10 days and applying to a court for relief, the court of appeals concluded,

> When a juvenile judge is evaluating an alleged unruly child, and it is possible that the child needs special education, then the Tennessee regulations and EHA provisions cited previously will govern the

> evaluation of that child. It is obvious that if the child is already in special education when referred to the juvenile judge that (sic) the special education regulations will govern the evaluation. This includes the convening of the M-Team and the threshold determination of whether the child's unruly conduct is a manifestation of his handicap. The juvenile Judge and circuit judge failed to follow this statutory mandate in their review of [McCann's] case.

In re McCann, supra, 1990 Tenn. App. LEXIS 125 at *12. The court of appeals therefore reversed the circuit court's affirmance of the adjudication of unruliness.

The plaintiff superintendent's attempts to distinguish *McCann* here fail, this court concludes. In the case at bar, the school administration, after failing to comply with IDEA's procedural requirements with respect to a timely determination of Chris L.'s eligibility to be treated as a disabled child under the act and with respect to the content and timing of notice to the child's parents, decided on May 17, 1993, that the child should be certified as educationally disabled because of ADHD. In spite of this decision, the administration proceeded to file its unruly petition in the juvenile court, without treating the commencement of the juvenile court proceeding as a change in educational placement entitling the child to the procedural and substantive protections mandated by the act whenever a change in educational placement is proposed. This was a deprivation of this child's statutory rights, and the ALJ properly fashioned his relief in the form of an order requiring the plaintiff superintendent to seek termination of the juvenile court proceeding.

Contrary to the plaintiff's argument, this case does not involve overreaching by the ALJ past the limits of his jurisdiction to interfere with the juvenile court's exercise of its jurisdiction. For one thing, the ALJ did not order the juvenile court to do anything; instead, it ordered the plaintiff, a litigant in the proceeding before the ALJ, to

seek dismissal of the proceeding on the unruly petition. The ruling and order of the ALJ in this case did not, as the plaintiff appears to argue, create a conflict or any tension between federal law as expressed in IDEA and the Tennessee law of juvenile justice, for Tennessee statutory law commands each juvenile court to follow state and federal laws governing evaluation whenever the court determines that the child before it is in need of special education services. Tennessee Code Annotated § 37-1-128(c)(1).

The plaintiff superintendent argues that *McCann* might be distinguished from the case at bar because Chris L. was not removed from school for a period in excess of 10 days. What makes the filing of an unruly petition a change in placement for IDEA's purposes, however, is the potential which juvenile court proceedings have for changing a child's educational placement in a significant manner. The plaintiff's argument on this point is an after-the-fact one, akin to arguing that a light sentence in a criminal case excuses a deprivation of due process in the course of the proceeding.

Contrary to the plaintiff's argument, upholding the ALJ in this case does not render the Tennessee Department of Education a super-legislature which decides the jurisdiction of Tennessee's juvenile courts on an *ad hoc* basis, nor does it provide each child who qualifies as disabled under IDEA with immunity from punishment in Tennessee's juvenile justice system. All that the administrative order entered in this case requires is that initiation of juvenile court proceedings concerning a disabled child be treated as a change in educational placement, so that the child receives all of the protections mandated by IDEA before adjudication of the child as unruly or delinquent commences. The plaintiff's argument that the school administration in this case determined that Chris L.'s unauthorized presence in the lavatory where the vandalism occurred was not related to or caused by his condition of

ADHD, and that it was therefore appropriate to commence the challenged juvenile court proceeding, skips over the fact that this determination was made at the "makeshift" M-team meeting concerning which the child's parents had plainly inadequate notice.

At the hearing before this court, the plaintiff made what the defendants' attorneys aptly characterized as a "parade of horrors" argument, designed to show that compliance with IDEA might force a school system to keep in a school, at least for a limited amount of time, a child shown to be dangerous. Whatever the weight which this argument might carry in the abstract, there is nothing in the record before this court to show that the child in this case presented a risk of physical injury to anyone. There was no emergency in this case on the basis of which the plaintiff superintendent might have been excused from compliance with IDEA or with the ALJ's order.

The only issue presented by the plaintiff's appeal in this case, the court concludes, is whether the ALJ properly ordered the plaintiff to seek termination of the juvenile court proceeding against Chris L. For the reasons stated above, the court holds against the plaintiff superintendent on this issue, and respectfully declines to follow the authorities from foreign jurisdictions cited by the plaintiff. Some of the issues stated in the plaintiff's brief [doc. 24], such as whether the incident of vandalism in issue was a manifestation of ADHD in this child's case, and whether it would not be better for the child in this case, from a therapeutic point of view, to face in the juvenile court the ordinary legal consequences of his alleged actions, seem to the court to be invitations to substitute its judgment and discretion for those of the ALJ, in spite of the deferential standard of review required in cases of this nature with respect to findings of fact. The court declines to enter into consideration of these issues of educational policy and the child's best interests, for which it, unlike the ALJ appointed by the Tennessee Department of Education, is poorly qualified.

A final argument made by the plaintiff superintendent which the court feels compelled to address is that the diagnosis of ADHD in this case was a misdiagnosis, and that Chris L. suffered at all relevant times instead from an oppositional defiant disorder which did not qualify him to be treated as disabled for IDEA's purposes. Setting aside the issues whether the plaintiff should be permitted to rely on medical evidence developed after the hearing before the ALJ, and whether this court is the proper forum to consider the correctness of the diagnosis of ADHD in this case, the court finds that the plaintiff has misconstrued the evidence on which he relies. John B. Robertson, Jr., M.D., a specialist in child and adolescent psychiatry, diagnosed oppositional defiant disorder, but he has made it clear in an affidavit attached to a brief filed by the defendants [doc. 29, ex. H] that he defers to the diagnosis of ADHD made earlier by Dr. Laurence, the psychologist. Dr. Robertson testified in his deposition given in this case on January 26, 1994, that the child was being treated with medication for ADHD when he saw the child, which might explain why he did not note symptoms of ADHD. Furthermore, as Dr. Robertson explained in this deposition, diagnoses of ADHD and of oppositional defiant disorder are not necessarily conflicting, because the former can lead to the latter, which can in turn be manifested by the afflicted child telling lies.

The defendants counterclaimed in this case for an award of attorneys' fees under 20 U.S.C. § 1415(e)(4)(B), which provides that in an action or proceeding brought to enforce rights under IDEA, "the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party." The plaintiff superintendent argues that because the defendants demanded a due process hearing so soon after requesting that Chris L. be treated as a disabled student under IDEA that the plaintiff did not have an opportunity to gather informa-

tion and respond to the request, the defendants' attorneys created a situation in which their clients could not fail to be prevailing parties, entitling the attorneys to be paid by their clients' adversary. For this reason, the plaintiff says that the court should find that the parties could have resolved many of the issues between them without this litigation, and so should deny the counterclaim in whole or in part.

Having considered the record and the applicable law, *see Phelan v. Bell*, 8 F.3d 369 (6th Cir. 1993); and *Krichinsky v. Knox County Schools*, 963 F.2d 847 (6th Cir. 1992), the court concludes that the defendants are prevailing parties who are entitled to an award of 100% of their attorneys' reasonable fees. The court finds that absent these attorneys' work and their demand for a due process hearing before the ALJ, the Knox County School System would have given only minimal consideration to Chris L's status as a disabled student, and would have proceeded to seek an adjudication of him in the juvenile court without considering the impact of the adjudication on his educational placement. While the parties resolved five out of six issues by agreement once the case was before the ALJ, this does not mean that the defendants were not the prevailing parties for the purpose of the statute; the defendants successfully altered the legal relationship between themselves and the Knox County School System.

To the extent that the parties resolved issues by agreement, the defendants' attorneys did not have to expend time litigating these issues, and so the plaintiff will not be penalized for having agreed to settle the issues. There is no evidence before the court concerning the amount claimed by the defendants' attorneys, and so the court will enter judgment on the counterclaim against the plaintiff in an unspecified amount, and will require the defendants to file a postjudgment motion for an award of

their attorneys' fees.[3] In considering this motion and the material filed in support of and in opposition to it, the court will be able to assess the reasonableness of these attorneys' claimed rates and their hours expended in working on this case.

The court will enter a judgment order in accordance with these findings of fact and conclusions of law.

ENTER:

/s/ Leon Jordan
LEON JORDAN
United States District Judge

---

[3] "Motions for attorney's (sic) fees are collateral to the merits of an action and may be considered even after an action is terminated." *Phelan v. Bell, supra,* 8 F.3d at 372 n.4 (citations omitted).

APPENDIX C

[Filed Sep. 28, 1994]
[Entered as a Judgment 9/29/94]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3-93-cv-0524
(nonjury)

ALLEN MORGAN,
Superintendent of Knox County Schools,
Plaintiff,

v.

CHRIS L., a minor, b/n/f Mike L.,
Defendant.

ORDER

In accordance with the court's findings of fact and conclusions of law filed simultaneously with this order, it is ORDERED that the administrative order filed in this case is AFFIRMED, and that the plaintiff's appeal is therefore DISMISSED.

It is further ORDERED that the defendants have JUDGMENT against the plaintiff on their counterclaim under 20 U.S.C. § 1415(e)(4)(B), in the amount of their attorneys' reasonable fees for their representation of the defendants in this matter. The court will assess the reasonableness of the claimed fees after the defendants file an appropriate motion supported by the affidavits of

their attorneys, and the plaintiff has an opportunity to respond to this motion and supporting affidavits.

/s/ Leon Jordan
LEON JORDAN
United States District Judge

APPENDIX D

BEFORE THE
TENNESSEE STATE DEPARTMENT
OF EDUCATION

No.: 93-19

DUE PROCESS HEARING

IN THE MATTER OF: CHRIS L.

FINAL ORDER

INTRODUCTION

This case concerns a 14 year old child diagnosed with Attention Deficit Hyperactive Disorder in May 1992 and certified as eligible for special education and related services May 17, 1993 near the end of his eighth grade school year. The request for due process hearing, dated June 4, 1993, presented issues relating to certification, reimbursement, provision of an appropriate educational program and related services, and disciplinary actions, including the filing of a juvenile court petition, by the school system. All issues but one have been decided upon motion or by agreement between the parties. The remaining issue is whether the school system violated the Individuals with Disabilities Education Act (IDEA) by filing a juvenile court petition for alleged school behavior without first following the required procedure to insure the student's rights under the IDEA.

The juvenile petition filed May 12, 1993 alleges that this "child did on May 11, 1993, commit the offense of vandalism, in that said child, along with [another child], did kick and twist a main water line pipe in a bathroom at [a system school]." It is signed upon oath by an individual identifying himself or herself as an employee of the school system.

PROCEDURAL HISTORY

This issue was first considered upon a Motion For Stay Put Order submitted on behalf of the student and a Motion To Dismiss submitted on behalf of the school. Additional pleadings and documents, including affidavits, were filed. The student requested an order be issued directing the school to take whatever actions were possible to terminate the juvenile proceedings. The school contended the petition was a Juvenile Court matter over which the Administrative Law Judge and courts considering special education matters had no jurisdiction. Neither motion was granted prehearing and the parties were provided the opportunity to further develop these issues.

At the beginning of the hearing on June 28, 1993, the school again requested a ruling on the Motion to Dismiss because of lack of jurisdiction and asserted that only the Juvenile Court or courts in the appellate process of those proceedings could consider this matter. The Motion To Dismiss was again denied. It appeared this might be purely a disciplinary action which could result in a change of placement and was a situation capable of repetition. The Administrative Law Judge expressed an interest in any policy for filing of juvenile petitions, the position of the individual filing the petition, and whether the assessment team members were aware of the petition.

EVIDENCE

Testimony of only two witnesses was presented during the hearing. They included the father of the student and

a psychologist. The school presented no evidence on the juvenile petition at the due process hearing.

The father testified that he had been concerned about the student's educational program at school as far back as 1986 or before. The student's grades and behavior remained unsatisfactory at least since that time. In the fifth grade he was tested for educational disabilities by the school. In the M-Team report dated January 29, 1990 the stated reason for referral was academic and behavioral concerns and the M-Team determined the student was not eligible for special education services. During the seventh grade (1991-1992) the parent had numerous meetings with the guidance counselor, teachers and principals. The student had suspensions from school, demerits, and in school suspensions and the parent was requested to give permission for his son to be paddled as discipline. In the spring of 1992 the guidance counselor suggested the student might should have outside counseling or other testings because she thought "we have some problems here". At one meeting with the school psychologist and the guidance counselor the parent was provided with a sheet of paper entitled "Attention Deficit Hyperactive Disorder (ADHD)" which is a form from school psychologists explaining ADHD and how to identify it. It contains a listing of fourteen characteristics and states a child must exhibit eight for a diagnosis. Nine were circled to indicate the characteristics all of the student's teachers agreed were exhibited by him. At the meeting the school psychologist informed the father she thought the student was "an ADHD child" and suggested the father have the child examined. The next morning, the father made an appointment with his medical doctor and was able to have the student examined one week later. The student was diagnosed in May of 1992 as ADHD and was prescribed medication. The doctor's appointment had been on May 21, 1992 and the father took the medical documents and prescription to school on May 22, 1992. There were no further meetings with school personnel that year. The

school performed no evaluation for educational disabilities during the seventh grade school year.

The student began the eighth grade in the fall of 1992 and the only meetings the parent had with school personnel then were concerning the prescriptive medication his son was taking for ADHD. The student's grades for the first half of the school year were not very good and he was having behavioral problems. His grades and behavior worsened and there were numerous instances of behavioral problems at school. In February of 1993, and after an occasion the student had been suspended, the father met with teachers and principals and told him he would take the student back to the doctor and see if the medication needed to be modified. The persons he met with said he should try that and see what happened. Before the father could get a doctor's appointment the student had been suspended again. The father took the student back to school after the medical appointment and was advised that the school had decided to suspend the student for the remainder of the year (this was around February 11, 1993). The father explained when he had been there a week ago he told them he would try to have the medication modified and it had taken him that long to get the doctor's appointment. The principal agreed not to suspend the student for the remainder of the year at that time. The doctor increased the medication and suggested that there be communication with the school personnel to observe the behavior and how the student was performing in school so that they could determine whether or not to further modify the medication.

The father was in frequent communication with the school guidance counselor who informed him there had been no improvement and asked him if he had thought about seeking private counseling for the student. When he replied in the negative, the counselor suggested he speak with the medical doctor to inquire of such services. The father did and the medical doctor recommended the

father seek such services. The student began receiving psychological services after his first meeting with the psychologist in March of 1993 and the school personnel knew that the student was seeing the psychologist.

After being informed by his wife that his son had been involved in a water incident at school with another child and had been suspended from school for three days, he and the student returned to the school on Monday, May 17, 1993, at the request of the principal, for a disciplinary hearing. The father received no other notice and no notice from the school regarding any M-Team. He did not know of any M-Team scheduled for May 17, 1993. When the father arrived at school on May 17, 1993 a juvenile officer and the principal were there. There was a meeting with the juvenile officer who questioned the student and took him to the bathroom for an on-the-site explanation of what the other student had done. Grades and behavior were discussed in another meeting between the father, his wife, the principal, the school guidance counselor, and a teacher, who were joined by the school psychologist. At that point the school psychologist said she was not really prepared for such discussion on that date, but because they were there they would go ahead and get it over with. The school psychologist said they needed to determine whether or not to certify the student and the general conversation was between the school psychologist and the guidance counselor until they determined the student should be certified as ADHD. The principal told them to decide on certification and he would decide on the disciplinary. The father and some of the other persons present signed the integrated assessment report certifying the student as eligible for services. At that point the principal made the statement that because the student was now ADHD the discipline would have to be done differently. The father was advised the other boy involved in the incident had been offered a suspension for the rest of the year or a ten days suspension and the same alternatives would be made available for this student. The prin-

cipal advised if they accepted a suspension for the rest of the year he would have to attend summer school and if he accepted the suspension for ten days that due to his handicap he would have to be provided tutoring. The parent requested other possible alternatives for the student. Based upon his request and the available service in school, it was determined that the student would be in a resource class for the remainder of the school year.

The principal stated he thought kicking the pipe could be related to ADHD and that was in agreement with the psychologist and guidance counselor. However, the school principal said the student being in an unauthorized bathroom had nothing to do with ADHD and the psychologist said she would tend to agree. After that, the principal brought the student in and questioned him about being in the wrong bathroom and the student explained, with tears in his eyes, that he went to the unauthorized bathroom because the boys in his grade engaged in horseplay and wrestled and picked on him. The student is one of the smallest children in the eighth grade. The principal said that he should have reported his fears to the principal rather than going to the unauthorized bathroom. The principal advised the student that he was being disciplined by being placed in a resource class.

Throughout this meeting on May 17, 1993 the father was not advised of any rights under the IDEA. He was informed that he would later hear from the juvenile officer once they decided if they were going to file any charges or not. He called the juvenile officer later that same day and was informed that a petition had been filed. He later received in the mail a copy of the juvenile petition which had been sworn to on May 12, 1993. A day or two later he called the principal and was advised that they were sorry, but it was out of their hands. About another week or two later he phoned the principal and at the principal's suggestion contacted the other boy's father and came up with a proposal for each to pay half of the damages.

When contacted, the principal thought that was good but later phoned the father and told them that the matter was out of their hands because it was in Juvenile Court and that he tried to drop the charges but could not. The principal told the father that the damages were $799.00 and some cents.

The next witness was a psychologist with a specialty and expertise in the area of Attention Deficit Hyperactivity Disorder. He met this student and his family on March 4, 1993 and had been working with the student on a weekly basis since then. The psychologist testified the student had been doing poorly in school and appeared to be headed for possible academic failure so his treatment was designed to stabilize the situation and contain his ADHD problem. The psychologist had reviewed various school records from kindergarten through May of 1993 and testified that the student's recorded behavior was consistent with behavior of a child with ADHD.

The psychologist had been informed of the May, 1993 incident at school where this student and another were accused of vandalism in a bathroom resulting in flooding and major damage to school property. The opinion of the psychologist was this conduct which formed the basis for the Juvenile Court Petition was a manifestation of the student's disability. Also, the psychologist testified that what was presented to him as the May 17, 1993 IEP appeared to be incomplete.

Relevant documents and exhibits include the "final copy" of a document marked "CONFIDENTIAL" apparently prepared by the school personnel after the assessment and after the May 17, 1993 development of an IEP. It reports the student was referred by the classroom teachers for an assesment because of his poor grades and behavior problems. It notes he had been taking Ritalin since he was identified by a physician as having ADHD and that initially his behavior had improved. However, behavior problems worsened after February, 1993 and

grades continued to be poor. The document provides that the teachers ranked the student in the "lowest 10% of the class in the areas of assignment completion, motivation and effort, following directions, functioning independently, following rules and structure and concentrating and attending in class." The document further notes that "Teachers indicated that [the student] has a tendency to do impulsive things which get him into trouble. Behaviors that they describe are consistent with the behavior of a student with ADHD". The document, at the sixth and final page, notes that there was a conference on May 17, 1993 where the father and his wife approved the reports and recommendations. It also records that there had been an additional issue where the student was recently involved in vandalism at school. It states that the M-Team made recommendations concerning "this situation" and "determined that [the student] should be served in a self-contained special education classroom at least on a temporary basis in lieu of suspension from school because of the infraction."

A document introduced as a page of an exhibit is a standard form "Notice of Disciplinary Hearing" and has written above it in handwriting "M-Team." It is partially completed to indicate that on May 17, 1993 at 9:30 a.m. there will be a hearing. However, it is not dated or signed by either the principal or assistant principal or by the student at the places indicated. The father testified he had not seen this document until it was provided by his attorneys in preparation for the due process hearing.

During the pleadings before the hearing, the school submitted an affidavit of a school principal which provided generally, in summary, as follows:

(a) On February 12, 1993 the school received a note from the student's pediatrician noting an increase in prescriptive medication and requesting the school to monitor the student.

(b) On February 26, 1993 a referral for assessment was made and an M-Team was convened due to the marked occurrence of the student's behavior at school.

(c) On May 11, 1993, and during the student's assessment, the student and another student were involved in an incident where he and/or the other student were involved in vandalism which resulted in property damage and for which this student was suspended for three days.

(d) The school filed juvenile petitions on both students on May 12, 1993.

(e) A disciplinary hearing/M-Team was scheduled on May 17, 1993 at which time the M-Team members determined that the student's conduct on May 11 was not a manifestation of his handicapping condition and reviewed the results of the assessment and formulated an IEP for the very short remainder of the school year.

(f) Prior to May 17, 1993, the student did not have an IEP or placement.

DISCUSSION

A. *Jurisdiction*

A special education administrative law judge has jurisdiction to consider the legality and propriety of a school system filing a juvenile petition alleging delinquent behavior of a child who is undergoing evaluation/assessment for certificaton as a child with disabilities entitled to special education and related services.

Although the case of *Hacienda La Quinta Unified School District of Los Angeles v. Honig,* 976 F. 2d 487 (9th Cir. 1992), deals with an expulsion and the decision is based, in part, on California statutes, the discussion of the Individuals With Disabilities Education Act and the

holding that the parents and student had due process rights before the student had been certified as "eligible" are applicable to this case. The procedural safeguards of IDEA are intended to apply to the identification process of children with disabilities. *See* 20 U.S.C. § 1412(2)(C) and 20 U.S.C. § 1415(b)(1)(E).

> A contrary result would frustrate the core purpose of the IDEA, which is to prevent schools from indiscriminately excluding disabled students from educational opportunities. In enacting the IDEA, Congress specifically recognized that undetected disabilities prevent many children from "having a successful educational experience" 20 U.S.C. § 1400(b)(5). If we found issues concerning the detection of disabilities to be outside the scope of IDEA "due process hearings," school districts could easily circumvent the statute's strictures by refusing to identify students as disabled. *Hacienda v. Honig,* 976 F. 2d at 489.

See also Kaelin v. Grubbs, 682 F. 2d 595 (6th Cir. 1982). *But see* Rules of Tennessee Department of Education, Rule 0520-1-3-.09(1)(e) which defines "eligible child" as one which has been determined by an M-Team to be in need of special education and related services.

A suspension or expulsion of a student from school for more than ten days for an offense is a change of placement and requires a school to follow certain procedures when imposing such discipline. *Honig v. Doe,* 484 U.S. 305 (1988); *Kaelin v. Grubbs,* 682 F. 2d 595 (6th Cir. 1982); Tennessee Department of Education Rule 0520-1-3-.09(9).

In *In Re: Tony McCann,* C.A. No. 158 Eastern Section Ct. App. (Tenn. April 6, 1990), 17 EHLR 551, 1990 Tenn. App. Lexis 258, the Tennessee Court of Appeals considered a Juvenile Court action which had resulted in the student not attending school for approxi-

mately one month. This was held to be a clear violation by the school which filed the petition in Juvenile Court against the student. In discussing the applicable law (now IDEA) the Court stated the following:

> Instead of evaluating Tony's behavior in light of his handicap and finding an appropriate educational placement, the Roane County School System initiated an unruly petition and placed him in the juvenile court system. School discipline problems and a student's failure to perform assignments must be addressed within the administrative framework of the school system before the school system can resort to court intervention. *In Re: Tony McCann, supra.*

The filing of a petition in Juvenile Court by a school can result in a change of placement whether for evaluation or as part of a disposition. *See* T.C.A. §§ 37-1-128 and 37-1-129. The procedures which may be involved in Juvenile Court after a juvenile petition has been taken out could interfere with the provision of special education and related services to which a student with disabilities may be entitled.

There should be no jurisdictional conflicts between the Due Process Hearing and the Juvenile Court. The jurisdiction of the Administrative Law Judge is over the school system and the action of the school system with regard to identification, evaluation, educational placement, and provision of free appropriate public education for eligible children. The Juvenile Court does have exclusive jurisdiction over the petition the school filed alleging vandalism by the student. T.C.A. § 37-1-103. However, the Juvenile Court has authority to dismiss the petition. T.C.A. § 37-1-1290. Even if the Juvenile Court deemed it appropriate to request an investigation and report of the child's condition it would appear that T.C.A. § 37-1-128(c)(1) would apply. It provides, in part, that "[I]f special education services are deemed necessary, then state and fed-

eral laws governing evaluation must be followed." In the interest of the children and parties involved, for judicial economy, and to better administer the laws of this State and the United States, it would be appropriate for the Administrative Law Judge and the Juvenile Judge faced with deciding upon a juvenile petition filed by a school system to communicate by telephone in the manner provided by T.C.A. § 36-6-207 (c) for determining the appropriate forum in certain child custody matters.

In the instant case there was an ongoing evaluation at the time the petition was taken out by the school. There has been a determination that the student needs special education services. The school has agreed during these due process proceedings to pay for and obtain further evaluation of the student and to develop an appropriate individual educational plan. It is clear from the evidence introduced during these due process proceedings that the behavior and the impulsive behavior which resulted in problems at school are a manifestation of this student's disability. He has been diagnosed and administered medication over a period of time. The student has the concern and involvement of his father and father's wife, a medical doctor, a psychologist, and various school personnel, who all appear to now be involved in and working toward development of the appropriate educational plan and placement for this child. Although the Juvenile Court does have the exclusive jurisdiction over this petition, it would appear that the appropriate disposition would be dismissal of the proceedings.

B. *Timeliness*

Timeliness is relevant to this issue because there is no apparent reason why the child was not certified as eligible and provided an appropriate IEP and placement even before the May 11 incident and the May 12 petition in Juvenile Court. Although a school "PRE-REFERRAL" form signed by four teachers for this student and dated

"2/11/93" appears to be the formal initiation of this assessment, the referral in this case was stated to be on February 26, 1993 and because of the student's poor grades and behavior. There is a delay from February 26 until after the father's signature on the consent form dated March 16, 1993 which both parties have sought to charge to the other. The testimony of the father is that the form was sent home with his child and he signed and returned it when he first learned the child had the document. There was a delay between the date the document was given to the child and when the father first learned of it. This delay must be charged to the school whose personnel has the responsibility for obtaining written consent from the parent. Sending the document home with the student may not be unreasonable but when it is not returned in a timely fashion, and the school initiates no communication with the parent, the school cannot claim the parent is responsible for a delay in the evaluation process in the face of an unchallenged explanation of the parent such as presented in this case. The time from referral on February 26, 1993 until the certification on May 17, at least upon the facts and circumstances presented in this case does not appear to be timely. Even more disturbing is the testimony of the father and the documentary evidence which appears to support the testimony that the parent was not notified of any intended M-Team meeting on May 17 and only appeared for a disciplinary hearing at the oral request of the principal communicated to the father by his wife.

Rules of the Tennessee Department of Education, Rule 0520-1-3-.09(4) require a school system to establish and use procedures to identify, locate, evaluate and determine eligibility of children for special education related services. Within 10 days of receiving a referral the school shall designate a staff member as chair person who will be responsible for securing written parental consent for the assessment and designating other team members. It is

provided that the individual assessment "shall be completed within a reasonable period of time" and an M-Team meeting will be convened to determine eligibility. If the child is eligible then the M-Team shall develop an IEP and a placement recommendation. Rule 0520-1-3-.09(5)(b) provides as a procedural safeguard that the school must provide written notice to parents of an eligible child or child suspected of being eligible and that would include all procedural safeguards available to the parents. The Tennessee Special Education Administrative Policy and Procedures Manual, under Rule Section 4(a)(1), provides the time between referral and placement shall not exceed forty days and intervention may be attempted during that time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The student has a history of behavioral problems and poor grades which have been addressed by his parent in every manner suggested by school personnel to include medical examination and diagnosis of ADHD, individual educational services from Sylvan Learning Center, psychological services, changes in medication prescribed for ADHD, and numerous meetings with school personnel.

This student is entitled by law to a free appropriate education and he and his parents have certain procedural and substantive rights under Individuals With Disabilities Education Act (20 U.S.C. § 1400 et seq.), Chapter 504 of the Rehabilitation Act of 1973, T.C.A. § 49-101-101 et seq., and federal and state regulations and rules.

On February 12, 1993 the school system received written communication from the student's pediatrician advising of a change in medication for ADHD and requesting the school to monitor the student.

On February 12, 1993 four teachers signed the pre-referral document indicating that alternatives other than special education had not been successful.

The school had the legal responsibility to obtain the parents' written consent for the assessment/evaluation.

On March 16, 1993 the father signed the consent to evaluate when it was first presented to him.

The behavior and grades for this student had been unsatisfactory for a number of years and worsened just before and during the evaluation process with no intervention attempted by the school.

On May 11, 1993 there was an incident at school which resulted in a three-day suspension of the student and oral communication relayed to the father that he should bring the child to school on Monday, May 17, 1993 for a disciplinary hearing.

On May 12, 1993 a school employee filed a petition in Juvenile Court alleging vandalism by the student. This was a disciplinary action.

The parent received no notice of the M-Team meeting scheduled for May 17, 1993.

On May 17, 1993 the school conducted a makeshift M-Team and disciplinary hearing to certify the student as eligible for special education and related services and developed an incomplete IEP with the placement being disciplinary action for the May 11 incident.

On May 17, 1993 the school certified the student as eligible for special educating services because he met the criteria as health impaired (ADHD).

On May 17, 1993 the M-Team decided the behavior of the student described as vandalism in the juvenile petition was a manifestation of the ADHD.

The behavior of the student underlying the juvenile petition for vandalism was a manifestation of the ADHD.

The evaluation/assessment of this student was not performed in a timely fashion. The school violated the IDEA

by filing the petition in Juvenile Court without convening an M-Team.

The father was unaware any juvenile petition had been filed when he attended the meeting at school on May 17, 1993.

There is no finding as to whether the principal or any other school personnel attending the May 17, 1993 meeting at school were aware of the filing of a juvenile petition; however, the presence of the juvenile officer at school on that date would strongly indicate that at least the principal had knowledge prior to the May 17, 1993 meeting with the parent.

The principal requested dismissal of the juvenile petition following the May 17, 1993 meeting and later communication from the father only to be informed that the principal, or the school system, had no control over the petition.

The filing of a petition in Juvenile Court shall be considered as the initiation of a change in placement and/or a disciplinary action commensurate with expulsion or suspension for more than ten days.

At least beginning with the date a child is referred for an evaluation, before a school files a petition against a child in Juvenile Court, it must follow the same procedures as for expulsion or suspension for more than ten days. The M-Team must determine if the behavior was a manifestation of the child's physical or mental characteristics and the appropriateness of the placement. These procedures are set forth in *Kaelin v. Grubbs*, 682 F. 2d 595 (6th Cir. 1982); *S-1 v. Turlington*, 635 F. 2d 342 (5th Cir. 1981); and, Rules of Tennessee Department of Education, Rule 0520-1-3-.09(9). *See also* Tennessee Special Education Administrative Policies and Procedures, Section IX and *Honig v. Doe*, 484 U.S. 305 (1988).

The school may suspend the student for up to ten days, they may reach some agreement with the student's

parents regarding a change in placement, or the school may apply to a court for specific relief if a dangerous situation is presented.

ORDER

It is, therefore, ORDERED that the school system take all actions necessary to seek dismisal of the juvenile court petition filed against this student.

Entered this 30th day of July, 1993.

/s/ Jack E. Seaman
JACK E. SEAMAN
Administrative Law Judge
611 Commerce St., Ste 2704
Nashville, Tennessee 37203
(615) 255-0033
Prof. Resp. #4058

CERTIFICATE OF SERVICE

I hereby certify that a true and copy of the foregoing document has been mailed, postage prepaid, to Brenda McGee, Attorney for Parents, 6608 Crystal Lake Drive, Knoxville, TN 37919, and Ed Dowling, Attorney for School System, Knox County Legal Department, City-County Building, 400 Main Street, Knoxville, TN 37902, by facsimile transmision this 30th day of July, 1993.

/s/ Jack E. Seaman
JACK E. SEAMAN

cc: Steve Raney, Esq.

NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the District in which the School System is located. Such appeal or review must be sought within sixty (60) days of the date of entry of a Final Order in nonreimbursement cases or three (3) years in cases involving educational costs and expenses. In appropriate cases the reviewing Court may order that this Final Order be stayed.

IMPLEMENTATION OF DECISION

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court under provisions of Tennessee Code Annotated § 49-10-601.

Within thirty (30) days from the date of this order, the local education agency shall render in writing to the Regional Team Leader and the Right-to-Education Office, a statement of compliance with the provisions of this order.